The Use of Classical Espionage, Electronic Surveillance and Covert Action Under International Law and Pursuant to the Commander-in-Chief and Foreign Affairs Powers of the President

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Table of Contents

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Introduction

1. This paper addresses itself to the issue of the justification of classical espionage, electronic surveillance and covert activity under international law. It specifically addresses itself to the question of whether general principles of international law exist which justify certain activities of the United States and the Central Intelligence Agency in the light of provisions of treaties to which the United States is a party and which at first glance would seem to prohibit such activities. The paper does not purport to deal in detail with the justification of these activities in light of the Constitution (aside from those provisions related to the conduct of foreign affairs) and statutes of the United States as opposed to treaties. The paper also does not purport to deal in detail with the general area of "paramilitary" activities.

The Rationale of Self-Preservation Under International Law

2. The right of self-preservation of the state is one of the most absolute in international law. In a world consisting of nation-states pursuing various methods and degrees of competition with one another, the exercise of that right can itself be equated with the reason of existence of the state. All other rules of international law, all other rules contained in treaties to which the United States is a party, inherently are subordinate to that right; those rules must be read and interpreted, from the outset, as inherently modified by the right of self-preservation.

3. The argument made in the preceding paragraph is well-supported by eminent jurists of international law. As early as 1831, the French edition of Kluber discussed the right of self-preservation as one of the "Droits absolus des Etats." Wheaton, Elements of International Law (1866), part ii, ch. i., para. 61 (publ. as no. 19 of The Classics of International Law, 1936) discusses the right at some length and equates its exercise with raison d'etat. On this issue, see also Phillimore, Commentaries, i (3d ed. 1879), 312-21; Heffter, Le Droit international de l'Europe (4th Fr. ed. by Geffcken, 1883), para. 30; Rivier, Principes du droit des gens (1896), i, para. 20; and Woolsey, Introduction to International Law (5th ed.), p. 184. Brownlie, International Law and the Use of Force by States (1963) p. 42 says:

> The right of self-preservation is ... a doctrine of necessity. There would seem analytically to be no distinction between the two and the discussions in works of international law certainly treat them as identical ... When 'necessity' is defined it appears to be applicable when action is necessary for the security or safety of the state. Rivier, loc. cit.; G.F. de Martens, Precis du droit des gens (1864), i. paras. 74, 78. See also Weiden, 24 Grot. Soc. (1938), p. 105, and Rodick, The Doctrine of Necessity in International Law ... [T]he state taking such action[is] regarded as the judge of the situation.

Fenwick, International Law (4th ed. 1965), p. 271 points out:

> The primary right of a state is clearly the integrity of its personality as a state, since the existence of the state is the necessary condition of any other rights that it may claim. At times [this right of national existence] is described as 'national security,' or as 'the right of self-preservation,' or the 'right of self-defense,' 'the fundamental law,' 'the first law of nature' to which all other laws are subordinate. In a letter of Secretary Seward to Mr. Adams in 1861, it is said: 'They [the positions assumed by the United States] are simply the suggestions of the instinct of self-defense, the primary law of human actions, not more the law of individual than of national life.' Series B., Sec. I, Tome I, p. 317. [Emphasis added.]

And Justice Field has told us:

> To preserve its independence, and give security against foreign aggression, and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinate. Chinese Exclusion Case, 130 U.S. 581, 606, 9 S. Ct. 623, 630 (1889). [Emphasis added.]

4. The doctrine of self-preservation has been used consistently through the ages, up to and including the 1970's, to justify some rather broad activities. The doctrine includes such customary examples as political or military acts in order to maintain a particular international or regional balance of power among States (e.g., the rearrangement of the map of Europe in 1815 by the Congress of Vienna; British and French participation in the Crimean War; the deliberate maintenance of governments by the 1878 Congress of Berlin; provisions relating to the reorganization of the defeated States by the Allies after World War II and Allied military and political activities in South Vietnam in 1965-73 in response to North Vietnamese attempts at extension of their dominion there[1/]); political or military acts in order to respond to any act "dangerous to ... [the] peace and safety" of the acting state (e.g., actions pursuant to the Monroe Doctrine against France in Mexico in 1863, against Spain in Santo Domingo in 1861 and in Peru in 1864, against Great Britain in Venezuela in 1895, against Great Britain, Germany and Italy in Venezuela in 1902, against Mexico's offer of a lease of Magdalena Bay to Japan in 1912; the employment of classical espionage, overflights and a resulting blockade against Cuba in 1962 in order to secure the removal of Soviet offensive missiles (on the latter action see, e.g., Address by President Kennedy, October 22, 1962 and U. S. Proclamation, October 23, 1962)); actions in order to protect spheres of influence (e.g., Miller, The Peace Pact of Paris, p. 198, relates that the

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1/ A corollary to the right of self-preservation is the right to prevent unlawful intervention by another state against a third state, even if the defense (as opposed to self-preservation) of the preventing state is not endangered. See Hyde, International Law (2d Ed. 1951) p. 248; Secy. of State Seward to the French Minister, Dec. 6, 1865, H. Ex. Doc. 73, 39 Cong., 1 Sess., II, 347, Moore, Dig., VI, 501; Oppenheim, Lauterpacht's 5 ed., I, Sec. 135 (4), p. 252. The successful effort of the U. S. to check the French intervention in Mexico, 1862-67, was an application of this principle. Likewise, U.S. efforts in Laos and South Vietnam in the 1960's can also be interpreted as acts taken pursuant to this principle.

British Foreign Office, by note in 1920, considered any interference with the right of free passage from Britain to India via the Suez Canal to be the equivalent of an attack on Great Britain itself); actions to remove an international nuisance (e.g., the United States' declaration of war on Spain in 1898 pursuant to President McKinley's Address to Congress of April 11, 1898, delineating the "chronic rebellion, military repression and lack of sanitary measures" in Cuba and actions to protect the lives and property of nationals (e.g., American actions in the Boxer Rebellion in China in 1900; U.S. military action in Nicaragua in 1926 and 1927; American clashes with Chinese troops in China, 1926-27; British naval action in China, 1926-27; the Franco-British military action in Egypt, 1956; Belgian military operations in the Congo, 1960 and U.S. and O.A.S. police action in the Dominican Republic in 1965).

5. The doctrine of self-preservation includes the right of anticipatory self-defense, i.e., it permits the state concerned to reasonably anticipate a danger and act accordingly. Bowett, Self-Defense in International Law, pp. 31, 58, 256, 269; Waldock, 81 Hague Recueil (1952, II), p. 463; Jessup, A Modern Law of Nations (1956), p. 166; Stone, Legal Controls of International Conflict, p. 244; Green, 6 Archiv (1957), p. 433; Redslob, Traite, pp. 243, 244; de Brouckere, 50 Hague Recueil (1934, IV), p. 33. There can be little doubt that the right of self-preservation and the doctrine of necessity comprehend anticipatory action. Brownlie, op. cit., p. 257. Westlake, in International Law (1904), i. 299, summed up the aspect of anticipatory self-defense as a corollary to the right of self-preservation when he stated:

> A State may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. [Emphasis added.]

In support of Westlake's proposition, see also Stowell, Intervention, pp. 355 et. seq.; Baty, The Canons of International Law (1930), p. 96; Lawrence, Principles of International Law (1930), p. 125; Fiore, Nouveau droit international public, i (Paris, 1885), paras. 454 et. seq.; Weiden, 24 Grot. Soc. (1930), pp. 122-5.

6. To believe that there has been universal acceptance by eminent international jurists of the doctrine of self-preservation as an absolute would be fallacious. Indeed, as Secretary of State Kissinger has pointed out, the arguments both for and against this doctrine present the framework for a great philosophical debate. Basically, however, the arguments against the doctrine are based on two major lines of reasoning. The thrust of the first line of reasoning is that the world is no longer a place of truly sovereign and independent nation-states but rather a place in which some greater supra-national order, as exemplified by international organizations and agreements, overrides, modifies and restricts the pre-existing parameters of national sovereignty, including the "absoluteness" of the right of self-preservation. According to this line of reasoning, the right of self-preservation would be subordinate to the language of international agreements expansively interpreted rather than vice-versa; likewise that right would be subordinate to expressions of world "public opinion" as expressed by organs such as the General Assembly of the United Nations. This line of reasoning is most amply described, perhaps, by one of its proponents, Professor Friedmann, in The Changing Structure of International Law (1964), p. 38:

> There are ... beginnings of a 'supranational' society, i.e., a society in which the activities and functions of states or groups are emerged in permanent international institutions. They derive their status from international treaties, and they are carried by the agreement and contributions of the Member States. But these institutions express purposes and functions of their own, and as they become more firmly established, they become increasingly emancipated from the states or groups establishing them. They develop a moral as well as a legal personality of their own. [Emphasis added.]

It is submitted, quite simply, that this line of reasoning simplistically ignores the reality of modern international relations. Even considering the reality of Communist-Western State detente, it is apparent that most, and probably all, states are motivated primarily by their own national interests in what they do, and act accordingly, rather than act primarily because of commitment to some supranational order which seeks to restrict and limit those interests. It is true that many of the less powerful actors on the international scene, acting out of their own national interest of self-preservation, have combined in blocs, e.g., in the General Assembly, and have expressed their opinions in votes the purport of which has been to limit an absolute

right of self-preservation of the great powers. Such actions, because of their underlying motivation of self-preservation, merely prove the rule of self-preservation rather than deny that right to the great powers because of the substance of the opinions expressed. International Law has never been established by majority vote of the General Assembly. Statute of the International Court of Justice (1945) Art. 38; Bishop, International Law (3d Ed.) pp. 25-61. The second line of reasoning seeks to define most acts of self-preservation carried on outside the boundaries of the acting state as illegal intervention in the internal affairs of another state. Whether classical espionage, electronic surveillance and covert action can or should be so defined is discussed in detail below; here, however, certain remarks about the general area of the legality of "intervention" in international law should be made.

7. Most commentators who argue against acts taken pursuant to the right of self-preservation as illegal "interventions" take as a starting point Article 51 of the Charter of the United Nations, which provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence[sic] shall be immediately reported to the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Certain commentators urge that Article 51 be read restrictively, i.e., it authorizes self-defense only when (1) an armed attack occurs against a Member and (2) the intervening State reports the intervention to the Security Council and only until the Security Council takes actions it considers appropriate relating to the entire issue. Brownlie, International Law and the Use of Force by States (1963). However, there is substantial support for the proposition that Article 51 is not exclusive and that all States still retain the rather broad rights of self-preservation or -defense as delineated in customary precedent. Bowett, Self-Defense in International Law, pp. 184-5, says:

> It is ... fallacious to assume that members have only those rights which general international law accords them except and insofar as they have surrendered them under the Charter.

For support of the same proposition, see also Goodhart, 79 Hague Recueil (1951, II), p. 192; Schwarzenberger, 87 Hague Recueil (1955, I), pp. 327 seq. and McDougal and Feliciano, Law and Minimum World Public Order, pp. 232-41. Second, commentators who argue against all forms of intervention as illegal often put forward, as, e.g., do the materials of Quincy Wright introduced into the Congressional Record of 20 October 1974 by Senator Hatfield, Article 2, paragraph 4 of the U.N. Charter; General Assembly Resolution 2131 (XX) (adopted December 21, 1965 by a vote of 109 to 0 with the U.K. abstaining); the 1970 General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States and Articles 18 and 19 of the OAS Charter. Article 2 of the U.N. Charter provides:

> [That all U.N. members will] refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

General Assembly Resolution 2131 provides:

> No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State ... [A]rmed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned.

The 1970 General Assembly Declaration on Principles of International Law provides that all forms of intervention described in Resolution 2131 "are in violation of international law." Articles 18 and 19 of the OAS Charter provide:

Article 18

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other

> State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.
>
> Article 19
>
> No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

8. The cited materials in paragraph 7 do not negate the absoluteness of the right of self-preservation, according to the sources cited in paragraphs 3 and 5. For example, Dr. Bowett holds the view that Article 2 of the U. N. Charter left the right of self-defense unimpaired and that the right implicitly excepted was not confined to reaction to "armed attack" within Article 51 of the Charter but permitted the protection of certain substantive rights:

> Action undertaken for the purpose of, and limited to, the defence [sic] of a State's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other state. Op. cit., pp. 185-6.

Bowett also espouses the view that self-defense, including the use of force, is justified in the case of threats to the political independence of a state constituted by subversion or economic measures. Op. cit., pp. 54, 113. Moreover, even if Bowett's view on self-defense not being intervention by definition is incorrect, the materials cited as opposed to intervention are themselves negated by the contrary custom since 1945 cited in paragraph 4. Interventions continue to go on in many different forms, and one of the first rules of international law is that when isolated examples become custom, that custom becomes part of the law. See Statute of the International Court of Justice (1945) Art. 38. Interventions have been customary since before the time of Christ. The Articles, Resolution and Declaration cited above must be read as modified by this on-going custom, as well as modified by the overriding right of self-preservation, and not vice-versa. Finally, the overwhelming motivation for proscriptions against intervention in the law has

been that interventions breed international political chaos and an unstable world order. This fear is a logical one in the abstract. When applied to particular interventions of the United States Government, and certain other great powers as well, the fear seems to be somewhat unjustified since many of these interventions have been designed in order to translate a somewhat unstable condition into a more stable one, rather than having the opposite effect.

Classical Espionage, Electronic Surveillance and Covert Action as Included in the Right of Self-Preservation

9. Classical espionage and electronic surveillance are inherent parts of the right of self-preservation because of the "necessity" theory pointed out by Brownlie in paragraph 3 above. Within the context of the rather sophisticated and subtle threats directed at U.S. national security in the 1970's, executed in turn by the extremely sophisticated technical means possessed by some of the U.S. potential adversaries, it is necessary that the U.S. be able to penetrate the state secrets of other powers in order to ascertain the existence and scope of any threat to the national interest. The right of self-preservation is a worthless one if the defending state is not entitled to know in advance what it might have to react against, and what means might therefore be appropriate to meet a given threat. This tacitly understood point has been most recently recognized in the opinion of the Third Circuit Court in U.S. v. Butenko, 494 F. 2d 593 (3d Cir. 1974), where it was pointed out:

> To fulfill [his Commander-in-Chief and foreign affairs] responsibilities, the President must exercise an informed judgment. Decisions affecting the United States' relationship with other sovereign states are more likely to advance our national interests if the President is apprised of the intentions, capabilities and possible responses of other countries. Certainly one means of acquiring information of this sort is through electronic surveillance. And electronic surveillance may well be a competent tool for impeding the flow of sensitive information from the United States to other nations.

Thus, it is fair to conclude that classical espionage activities and electronic surveillance authorized by the President in the foreign intelligence field, in cases where one is dealing with the unknown, are ipso facto "reasonable" within the context of the Fourth Amendment. No one argues, of course, that

the President is authorized to direct classical espionage or warrantless and trespassory electronic surveillance at any and every American citizen, because, in the absence of any information one way or the other, that citizen just might, e.g., be involved in an imminent and significant coup attempt directed against the United States Government on behalf of a foreign power. If, however, there is some reasonable connection between an American or foreign national and a foreign state, and there is some interest of the U.S. to be protected from that state, then the issue is moved into the "foreign intelligence" area, and even in the absence of further information about a possible threat to the national interest, the President's "foreign affairs" powers come into play. See below, paras. 16-18. In order to determine the mere existence of a danger, as well as its scope if it does exist, he must be able to move immediately and in the utmost secrecy, using, of course, his good faith and judgment, to determine the existence and scope of any potential danger. Constitutionally, under U.S. v. Curtiss-Wright, 299 U.S. 304 (1936) (see below) and Butenko, his discretion and judgment, if in good faith, must be honored by the courts in the realm of foreign intelligence, since his paramount criterion and standard for action is the near-absolute rule of self-preservation under international law.

10. Covert action is an inherent means of self-preservation because of what has been called the "proportionality" rule of self-defense. Director of Central Intelligence William Colby, in opining several times in public that it would be a mistake to deprive our nation of the possibility of some moderate covert action response to a foreign problem and leave us with nothing between a diplomatic protest and sending the Marines, was actually making a point long held to be part of international law by reason of the proportionality rule. That rule can be stated thus: acts employed in self-preservation must be proportionate to the threat. Brownlie, op. cit., p. 261. The formula used by Secretary of State Webster in relation to the Carolina incident of 1841 has attracted international legal jurists by virtue of his insistence that self-preservation must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." In Reports and Resolutions on the subject of Article 16 of the Covenant, L. of N. Doc. A. 14.1927. V.V. Legal 1927.V.14, pp. 60, 69, de Brouckere points out:

> Legitimate defence [sic] implies the adoption of measures justified by the seriousness of the danger.

The proportionality rule is not a glib euphemism for "two wrongs make a right." On the contrary it is a well-respected and recognized rule of international law which permits a state to respond to the activities of a state directed at the national interests of the first state in an appropriate and reasonable manner adapted to the efforts of the state whose actions first initiated the problem. Thus, as Director Colby has pointed out several times, the United States Government in the 1950's and 1960's responded to the Communist-subsidized effort to develop a panoply of international front organizations by assisting American sponsored private groups to articulate the views of American students abroad and in 1962 responded to the presence of 5,000 North Vietnamese troops in Laos in violation of the Geneva Accords with covert support to indigenous groups wishing to maintain the integrity of the personality of the State of Laos. 2/

Do Classical Espionage, Electronic Surveillance and Covert Action Constitute "Illegal Intervention" in the Internal Affairs of Other States?

11. Certain commentators have submitted that classical espionage, electronic surveillance and covert action are violations of international law because they involve illegal intervention in the internal affairs of other states. Two issues are raised by this argument. First, are acts based upon self-preservation an illegal intervention in the internal affairs of another state? This legal issue has already been dealt with in paragraphs 6-8 above. Even assuming, however, that acts based upon self-preservation may be illegal interventions, a second issue must still be resolved before one decides that in the absence of war spies operate only in violation of international law; that second issue is whether classical espionage, electronic surveillance and covert activities are properly classifiable, aside from any issues of self-preservation, as that kind of "intervention" declared unjustifiable in certain sources of international law. This second issue is more an issue of classification, rather than legality versus illegality. A statement arguing that these activities are so classifiable, however, is Quincy Wright's assertion, made in 1963, and introduced into the Congressional Record of 2 October 1974 by Senator Hatfield, that:

2/ See footnote 1, page 3.

> ... [i]n time of peace ... espionage and, in fact, any penetration of the territory of a state by agents of another state in violation of the local law, is also a violation of the rule of international law imposing a duty upon states to respect the territorial integrity and political independence of other states ....

12. A number of remarks and objections can immediately be raised to Professor Wright's statement. First, as the materials introduced by Senator Hatfield point out in very brief outline (Goodrich, Hambro and Simons, Charter of the United Nations, Commentary and Documents (3d Ed. 1969)) classical espionage, electronic surveillance and covert actions do not fall neatly into areas normally and easily recognized as "interventions" under international law. Most of these areas deal with the use, or threat of use, of force. See, e.g., Article 2 of the U.N. Charter and Fenwick, International Law (4th Ed.) p. 291. (One should recall that even when force, or the threat of force, is used, as e.g., in some covert action, that that action can often be justified under the rules and custom relating to self-preservation, above paras. 2-5.) Second, interventions declared to be illegal by the commentators usually include, as a necessary part of such an intervention, action directed against the "personality of the State." The personality of a State can, of course, never be equated with a particular government under international law. See, e.g., Hackworth, 1 International Law 127 (1940). A government may act in either a lawful or unlawful manner with regard to the laws and constitution of its own state; likewise, it may be representative or unrepresentative of its state. The objectives of classical espionage and electronic surveillance deal merely with the gaining of information, not with the subversion of the personality of a State. Whether particular covert activities interfere with the personality of particular states can only be analyzed on a case-by-case basis; suffice it to say that many activities carried out in the past by the United States Government as, e.g., political action in Laos in the 1960's, were designed to strengthen and support the personalities of particular states against foreign or foreign-oriented protagonists seeking to alter the constitutional order within those states.

The 1961 Vienna Conventions on Diplomatic and Consular Relations vis-a-vis the Commander-in-Chief and Foreign Affairs Powers of the President and the International Legal Right of Self-Preservation

13. The 1961 Vienna Convention on Diplomatic Relations and the 1961 Vienna Convention on Consular Relations (TIAS 7502) have been acceded to by approximately 108 states since becoming available for ratification in 1964. A list of the states which have so acceded is attached hereto as Exhibit A.

14. Of interest for the subject of this paper are Articles 22, 30 and 41 of the Convention on Diplomatic Relations. Parallel provisions appear in the Vienna Convention on Consular Relations. Article 22 provides:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 30 provides:

> 1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
>
> 2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

And Article 41 provides:

> 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and

immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

15. Section 2 of Article II of the Constitution deals with both the foreign affairs and Commander-in-Chief powers of the President. However, with regard to foreign affairs, the President is not limited to the powers specifically enumerated in that document; moreover, the source of his foreign affairs powers is not solely the Constitution but also the fact that he is the representative of the sovereignty of the Union in international relations. As Justice Sutherland says in U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936):

> The...statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.... When...the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to

> the Union.... The Union existed before the Constitution .... Prior to that event, it is clear that the Union...was the sole possessor of external sovereignty, and in the Union it remained without change save insofar as the Consititution in express terms qualified its exercise.... It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality.... In this vast external realm...the President alone has the power to speak or listen as a representative of the nation .... The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.... He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be waged with the greatest prospect of success. [Emphasis added.]

16. The Court was saying a number of things in Curtiss-Wright. Of most importance, perhaps, were two: first, that the President has assumed the sole burden of effectively managing the nation's foreign relations in accordance with all the powers normally due a sovereign within the international legal order (and limited solely by explicit and unquestioned proscriptions within the Constitution itself) and second, that the exercise of these powers involved both complexities of analysis and inherent danger to the national interest if effective and necessary action was not taken within the required time. The second point has become known as part of the "political question" doctrine and has led American courts to defer to the action of the Executive in matters involving such issues of the governance of American international relations. Mitchell v. Laird, 476 F.2d 533 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973).

17. Assuming that the first point is part of the constitutional interpretation of Presidential powers, then the President may exercise those near absolute rights of self-preservation and anticipatory self-preservation recognized in internal law, and enumerated in paragraphs 2-5. Thus, if the President reasonably determines that the self-preservation of the United States so requires, he may legally, within the realm of foreign relations, direct a policy to be implemented which at first glance might seem not to be in accord with a given treaty provision. The rights of self-preservation and anticipatory self-defense must and do dominate over any treaty provision in terms of deciding what rule of international law is controlling. Normally this action of the President would be within the scope of his legal prerogative and not subject to judicial review pursuant to the cases cited in paragraph 17. Indeed, because of the Commander-in-Chief and foreign affairs powers, even Congress may not constitutionally have the right to interfere by statute (with the exception, of course, of the appropriation, ambassadorial approval, and advise and consent functions constitutionally accorded it) with those powers. In discussing whether Congress might have limited the President's foreign affairs intelligence powers in drafting Sec. 605 of the Communications Act of 1934, the court in U.S. v. Butenko, 494F.2d. 593 (3d Cir. 1974), cert. denied, 43 U.S.L.W. 3213 (U.S. Oct. 15, 1974), which cites U.S. v. Curtiss-Wright, supra, said:

> Indeed, had Congress explored the question, it no doubt would have recognized, as (the District Court's) discussion may well indicate, that any action by it that arguably would hamper ... the President's effective performance of his duties in the foreign affairs field would have raised constitutional questions. [Emphasis added]

18. It may appear that the particular issue raised in this section is not particularly apropos to a paper dealing primarily with the legitimacy of certain actions under international law or that this section confuses legitimacy of action under domestic law with legitimacy of action under international law. Unfortunately there is, and probably must be, an overlap or an inherent friction with regard to the latter two fields. This is primarily because constitutionally-authorized Presidential action in the area of foreign affairs inherently is noteworthy in terms of the question "What is the customary international practice?" International custom has a qualitative as well as a quantitative aspect to it. For example, if the United States or the U.S.S.R.,

as the world's two superpowers, abstained from a practice sustained by the developing states, i.e., a majority of the U. N. members, it is dubious that one could correctly call that practice customary international law. Obversely, if the U. S. and U.S.S.R. engaged in an international practice abstained from by the rest of the world, the qualitative impact of that practice alone, as Professor Roger Fisher of the Harvard Law School has pointed out, would create a strong case for arguing that the practice constituted a customary rule of international law, at least within the area of U.S.-U.S.S.R. international interaction, or alternatively, within the functional area of the practice. In other words, constitutional Presidential action in foreign affairs, especially but not only when initiating a new practice, has an important informative role to play with regard to international law. International law, on the other hand, may have a formative role in terms of Presidential decision-making. There is an interaction here to be sure, but for purposes of U. S. law, the emphasis must be placed on the formative effect of Presidential action on international law rather than the other way around. This point is made clear by the old, but nevertheless standing, case of The Paqueto Habana, 175 U.S. 677 (1900), where Justice Gray declared:

> [The] rule of international law is one which ... courts administering the law of nations are bound to take ... notice of, and to give effect to, in the absence of any ... public act of their own government in relation to the matter. [Emphasis added.]

In Paqueto Habana the Court decided that peaceful fishing vessels were not subject to capture in time of war, but an important part of the Court's thought process, as reflected in Justice Gray's opinion, was that President McKinley had declared that the Spanish-American War would be conducted by the U. S. in accordance with theretofore recognized international custom relating to the laws of war. The Court, in Paqueto Habana, was saying that President McKinley's decision was formative in terms of the rules of international practice governing U. S. conduct of the war; the Court was not saying that the prior international practice would have made a contrary decision by the President wrongful or illegal under international law. Likewise, Judge Thomas in The Over the Top, 5 F.2d 838 (D. Conn. 1925), declares: "International practice is law only in so far as [the U. S.] adopts it...." Judge Thomas' statement may be a bit strong; nevertheless, it accurately makes the point that constitutional Presidential action in the area of foreign affairs must be weighed by U. S. courts as of paramount

importance in deciding what the applicable rule of international law is. In sum, U.S. unilateral action plays an extremely important role in forming, as well as confirming, international rules; and if any U. S. action, especially action based on the rule of self-preservation, is contrary to the practice of certain other states, for purposes of U. S. interpretation of international law, one has an extremely difficult burden if he wishes to contend that the U. S. action is violative of international law.

Separate Issues Concerning the Interpretation of the Provisions of the 1961 Vienna Conventions: Do They Really Prohibit Classical Espionage, Electronic Surveillance and Covert Action?

19. The first point to be made about the interpretation of the provisions of the Vienna Conventions is that American sources have never considered them to be absolute. For example, 2 Foreign Affairs Manual (FAM), Department of State, 231.3 (4-30-68) states that the inviolability of foreign diplomatic premises has an exception "in cases of public emergency." Fires or similar disasters have been traditionally referred to as examples of such emergencies.

20. The second, and perhaps the most important point concerning the interpretation of the cited Articles, is that their provisions must be interpreted in light of on-going custom (i.e., custom related to a treaty provision which led to a rule of international law before the treaty, and which custom continued during the period of treaty ratification, and still continues today. Pollock, "The Sources of International Law," in 2 Col. L. Rev. (1902) 511-512.

21. Espionage and covert action have been part of the customary practice of States in their international relations since before the time of Christ. They continued to be part of the international practice of most States during the period of ratification of the Vienna Conventions. They continue to be practiced today. The last two sentences can also be applied to the practice of electronic surveillance. President Ford made this point perfectly clear in referring to the customariness of espionage activities in world affairs at his press conference of 16 September 1974. At that conference, the President stated:

> ... Our government, like other governments, does take certain actions in the intelligence field to help implement foreign policy and to protect national security. I am informed reliably that Communist nations spend vastly more money than we do for the same kind of purposes.... (H)istorically, as well as presently, such actions are taken in the best interests of the countries involved. Washington Post, September 17, 1974.

The fact that embassy facilities of many states in many different host countries have consistently been used by intelligence officers in order to carry out classical espionage, electronic surveillance, and covert activities is so well documented, that there can be little doubt that these activities constitute customary international practice. With regard to diplomats of the Eastern European states and the U.S.S.R., attention should be drawn to the Washington Post of 17 October 1974, which reports:

> FBI Director Clarence M. Kelley yesterday warned that the FBI doesn't have enough agents to keep track of the growing number of foreign spies in the United States....
>
> Kelley told reporters there is a growing gap in the ratio of FBI agents to Communist diplomats ... all of whom he called 'potential agents gathering information.'

No concerned party has suggested that any of the cited articles modify its ongoing practice or the practice of other States related to espionage or surveillance activities. Nor has any member of the U. S. Senate, in giving his advice and consent regarding the Conventions, or at any later time, so suggested. As Robert C. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice, in a letter of 4 May 1973 to the Acting Legal Adviser of the Department of State regarding the Convention on Diplomatic Relations, points out:

> ... [T]he history of the ratification of the Convention shows that neither the Executive nor the Senate intended, by ratification, to supercede existing legislation and that separate action would be needed if existing law were to be repealed. Rovine, Digest of United States Practice in International Law 1973, p. 145.

22. Mr. Dixon's statement is significant in light of the fact that Congress, in Executive Session, deliberated long and hard on the powers and functions to accord the Central Intelligence Agency in the National Security Act of 1947. The legislative history of those Executive Sessions shows that it was the clear intent of both the Executive and Legislative Branches to grant the Agency a charter which included traditional collection, evaluation, and dissemination activities and related intelligence functions. Since then, the Agency has carried on its espionage, surveillance, and covert activities only under the direction of the President and duly delegated

Executive committees. The Executive Branch has, moreover, continued to task the Agency with frequent and significant operational activities up to and including the present. Congress, through the oversight committees of both the Senate and the House, has been informed and advised of all significant Agency activities affecting the foreign relations of the United States. Throughout this process congressional approval of Agency appropriations has continued. Most recently, on 2 October 1974, the U. S. Senate defeated a motion by 24 to 56 votes designed to limit or end Agency liaison with and assistance to foreign police authorities and, on the same day, resoundingly defeated, by a vote of 17 to 68, a motion which would have limited the covert activity role of the Agency as a tool of U. S. foreign policy. The Washington Post, in referring to the latter vote in its editorial on 7 October 1974, said:

> The CIA and its supporters can ... claim -- fairly, we believe -- that ... the agency has a congressional mandate ... for covert operations.

23. No State has argued that the Conventions cited, or any other rule of international law, prohibit these tacitly agreed-upon activities of the secret services. Understandably, this has not been a subject of great debate in the past. These areas are of course sensitive ones. But there is nothing in the Conventions on Diplomatic and Consular Relations which should lead one to believe that these Conventions were meant to deal with the subject of classical espionage activities, or to outlaw those activities. Customary international practice, in fact, makes it fairly clear that the Conventions were intended merely to deal with the traditional diplomatic jurisdictional immunities and privileges accorded members of the diplomatic community by national courts and national judicial processes. The history of the ratification of the Conventions by the U. S. Senate, the expressed opinion of the U. S. Congress concerning Agency activities found in debates on the Agency's charter, appropriations and policy votes furthermore confirm that the views expressed in this paragraph are most definitely the agreed-upon interpretation of the Conventions as far as the Executive and Legislature of the United States are concerned.

Conclusions

24. The sovereign right of self-preservation, which includes the right of anticipatory self-defense, is one of the most absolute in international law. It inherently dominates any interpretation of any other rule of law, including treaty provisions.

25. Classical espionage, electronic surveillance in intelligence matters, and covert action are traditional parts of the right of self-preservation.

26. It follows that the President may constitutionally authorize actions for the self-preservation of the United States, unless explicitly prohibited by the Constitution itself. Such actions would be greater evidence of a rule of international law than a provision of a prior treaty to which the U. S. was a party.

27. The Vienna Conventions on Diplomatic and Consular Relations address themselves to the protection of traditional diplomatic privileges and immunities and were not intended to outlaw espionage activities. This point is made perfectly clear by the ongoing customariness of these activities by the States-Party.

28. The Executive and Congress of the United States have clearly intended, in expressions of their opinions up to and including October 1974, that the Agency continue its traditional tasks in the realms of classical espionage, surveillance, and covert activities. No obligation of the United States undertaken pursuant to international law was intended by the United States Government to modify the scope of these tasks.

25 MAR 1975

IC REGISTRY ROUTING SLIP

	Office	Init.	Date
	D/DCI/IC		
2	AD/DCI/IC		
1	EO	M	3/25
	PD/Plans		
	SA		
	CS		
	MPRRD		
	PRD		
	CPAD		
	HUMINT Br.		
	USIB Sec.		
	Sec Comm		
	IHC		
	IC Registry		

ACTION OFFICE _____

SUSPENSE DATE _____

IC Staff received ___ cys - furn offices circled.

COMMENTS:

[redacted]: Have not made cys - How many and dissemination pls. ?? 25X1A

Jim P

1-2

John:

Do you want Gen Thomas to start collecting items such as this, & should we send it to the Task Force? M

Need this back for files. This is better copy than mine

Rosanne

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: General Counsel

EXTENSION [redacted]

NO. 25X1A

DATE 25 March 1975

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. DDO 7E26 Hqs.				Attached is a memorandum of law dealing with the status of espionage and covert action in international law. While it is true that in most questions involving international law one can construct rationales which will be diametrically opposed, I think in this case we have a persuasive rationale. I thought you would be interested. 25X1A
2. DDI 7E44 Hqs.				
3. DDA 7D26 Hqs.				
4. DDS&T 6E60 Hqs.				
5. OLC 7D43 Hqs.				
6. OIG 2E24 Hqs.				
7. D/DCI/IC 7E13 Hqs.				
8. D/DCI/NIO 7E62 Hqs.				
9. Comptroller 4E38 Hqs.				
10.				
11.				
12.				
13.				
14.				
15.				

[redacted]

John S. Warner